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IN THE

# Supreme Court of the United States

October Term, 1930.

No. 36.

R. E. GRAHAM AND E. E. FOSTER, CO-PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF MILLIE FRANCIS OIL COMPANY, A CO-PARTNERSHIP, PETITIONERS,

*v.*

REX B. GOODCELL, FORMER COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA, IN AND FOR THE SIXTH COLLECTION DISTRICT, STATE OF CALIFORNIA, RESPONDENT.

## MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ, AND BRIEF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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## MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ, AND BRIEF.

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MAY IT PLEASE THE COURT:

The undersigned respectfully move this Honorable Court for leave to file the accompanying brief in this case as amici curiae.

ROBERT N. MILLER,
DONALD V. HUNTER,
S. LYMAN BARBER,
*Amici Curiae.*

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## BRIEF OF AMICI CURIÆ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

### Statement:

The case was tried before the District Court, for the Southern District of California, which decided in

favor of the petitioner (R. 15-19), upon a motion for judgment upon the stipulated facts. The Circuit Court of Appeals, in an opinion rendered November 4, 1929 (R. 36), and reported in 35 Fed. (2d) 586, reversed the decision of the District Court, on the ground that Section 611 of the Revenue Act of 1928, which had not been relied upon below, barred recovery by the petitioner. Certiorari was granted by this Court on March 3, 1930.

The facts are as follows: In 1920 the Commissioner of Internal Revenue assessed additional income taxes for the year 1917, and the taxpayer filed in the same year a claim to abate (that is, to cancel) this assessment. This claim was pending until December 22, 1922, when the Commissioner denied it. During the interval after this disposition of the claim in 1922 and before March 22, 1923, (on which date the statute of limitation ran against collection by the Government), the Commissioner failed to collect. In 1924, the Government, disregarding the statute of limitations, forced the taxpayer to pay the assessment. The petitioner has sued herein to recover back the sum so paid under duress. The respondent contends that (in spite of the fact that the tax was collected after it was barred) Section 611, Revenue Act of 1928, prevents the taxpayer from recovering in this action. The petitioner contends that Section 611 has no such effect.

Cases involving the construction of Section 611 have been said to fall into two classes, (1) those similar to this case, in which the illegal collection of the tax occurred *before* Section 1106 (a) of the Revenue Act of 1926 became effective (to the effect that the running

of the statute of limitations "extinguishes the liability", as well as bars the remedy), and (2) those in which the collection occurred *after* such effective date.

The Court of Claims suggested such a classification in a very recent decision (*Wyman, Partridge Company v. The United States,* discussed on page 39 of this brief) and considered that the two classes of cases ought to be treated differently. The undersigned *amici curiae* represent taxpayers whose cases would fall in each of the two classes, and urge that recovery should be allowed in both classes.

## PROVISIONS OF LAW.

Section 611 of the Revenue Act of 1928 provides:

> "SEC. 611.—COLLECTIONS STAYED BY CLAIM IN ABATEMENT.
>
> "If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

Section 607 provides:

"SEC. 607.—EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

## ARGUMENT.

**I. In drafting Section 611 of the 1928 Act, Congress used the word "stayed" advisedly and in a sense different from "delayed"; further, even though the word "stayed" is construed as merely meaning "delayed", the facts here involved fail to show that the Collector's failure to collect, after the claim in abatement had been denied, was because of the abatement claim.**

(a) The application by the court below of Section 611, 1928 Act, to the instant case was erroneous, first, because there was no "stay" either before or after the rejection of the abatement claim, but rather a mere voluntary delay on the part of the Commissioner in making collection.

In prescribing the condition "if the collection . . . was stayed" Congress was not employing inaccurate terms. By this expression was contemplated some act of the taxpayer which legally or morally tied the hands of the collector. *United States v. Burden,*

*Smith & Company,* 33 Fed. (2d) 229. No such stay occurred in this case; the Collector merely failed to collect. The petitioner had filed a claim in abatement (Bureau of Internal Revenue Form 47; "claimant now asks and demands an abatement" of the tax) which merely amounted to a request that the previously-made assessment be cancelled. The claim in abatement does not ask the Commissioner to hold up collection. If the Collector does delay, it is either because he is dilatory or because he chooses to delay, and the word "delay", rather than the word "stay" is apt in the situation.

The Treasury Regulations are clear on the subject:

> "* * * The filing of a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund" (Article 1032, Regulations 45).

The word "stay" is used in other situations which arise under the Revenue Acts, where the Collector is under some obligation to defer collection. For instance, Section 273, Revenue Act of 1928, at paragraphs (f), (g) and (h), provides for a "bond to *stay* collection". If an acceptable bond is filed, the collection is stayed in the sense that it is illegal for the Collector to enforce collection, and there are other circumstances, not involving the giving of a bond,

in which the Collector is legally or morally prevented from making collection. Thus, if the taxpayer appeals to the Board of Tax Appeals from a 60-day letter, the Collector is powerless to make collection unless the situation is such that an emergency exists. The filing of an appeal "stays" the hand of the Collector. In other cases, collection has been stayed by the deposit of money in escrow instead of giving a bond, as in *Pigott v. Poe,* Prentice-Hall 1929 Federal Tax Service, Par. 1749, page 1615. Other forms of binding agreements relating to abatement claims are met with, which, as effectively as a bond, would directly stay collection by tying the hands of the Collector. Compare *Mascot Oil Company, Inc., v. The United States,* 37 Fed. (2d) 986. The most that Section 611 purports to do is to reach such cases, as well as those where the stay is due to the filing of a bond;—not such cases as the present, involving mere delay, without obligation of any sort.

In Section 603 (c) of the same Act, it is provided that an appeal to the courts to review a decision of the Board of Tax Appeals "shall not *operate* as a stay of assessment and collection", and Subdivision (d) of the same Section prescribed the procedure to be followed "where assessment or collection has not been *stayed* by the filing of bond." Thus, Congress had in mind some act which "operated" on the Collector and stayed his hand.

The rule of construction applied by this Court to the meaning of the word "proceeding" in Section 250 (d) of the Revenue Act of 1918, in the case of *Bowers v.*

*New York & Albany Lighterage Company*, 273 U. S. 346, is fully applicable here, but the court below, in construing Section 611, gave that section a more than liberal construction in favor of the collector, and against the taxpayer.

(b) The decision of the court below was erroneous, also, because, even if the Collector's inaction *after the claim was rejected* is regarded as a "stay", there is no evidence that such stay was caused "*by* the claim in abatement", since that claim had previously been disposed of by rejection.

The heading of Section 611, "Collection Stayed *by* Claim in Abatement", confirms the common sense conclusion that the section was meant to apply only when the claim in abatement was the active cause of the failure to collect in time. Even if there has been a "stay", operating up to March 22, 1923, this would not be material, if it was due to some other cause; the stay must be caused "by claim in abatement" if it is to affect the case.

It clearly appeared that, after the rejection of the claim in abatement, there remained a period of two months and twenty-five days (from December 22, 1922, to March 22, 1923) within which summary collection could have been made by the collector. He did not collect during that period. In fact, no collection was made until November 19, 1924, approximately one year, ten and a half months after the claim in abatement was denied.

It was the collector's duty to make collection at once after rejecting the claim, if he had not elected to col-

lect before. His failure to collect during the period of nearly three months which remained before the running of the statute of limitations was not shown to be due to any provision of law or anything the taxpayer did. The length of his actual delay (more than one and three-fourths years after the claim in abatement had become *functus officio* through rejection) tends to negative any idea that his failure to collect was due to anything but oversight.

In this case it is impossible to find that there was any relation between the claim in abatement which was denied in 1922 and the delay in collection which *thereafter* occurred unless, without warrant, we assume an irrebuttable presumption to that effect. Article 1032 of Regulations 45, previously quoted, negatives any such presumption, since it expressly instructs a collector that he is free to collect, if he considers it necessary, even though an abatement claim has been filed.

These regulations reflect what is otherwise well known, i. e., that collectors of internal revenue operate under bond (Section 3143, Revised Statutes; Section 15, Title 26 U. S. Code), are charged with the taxes assessed against taxpayers in their collection district, and have very broad discretion as to the time and manner of making collections, and in addition *sometimes fail to make collections within the period required by law, through mere oversight.*

It should be noted that the facts in this case are peculiarly within the knowledge of the Collector, whose delay in collection rendered his subsequent collection illegal. Must the taxpayer put the Collector on the

witness stand and seek to prove by him the negative proposition that the delay was not due to the abatement claim?

Clearly the Collector had the burden of proving that the delay which occurred was due to the petitioner's abatement claim. Yet no evidence to that effect was offered, nor is such finding warranted from the undisputed facts in the case. On the contrary the facts show that after the abatement claim ceased to exist, because of rejection by the Commissioner, time still existed within which collection legally could have been made, but that collection was not attempted until almost two years thereafter, requiring the conclusion that the delay which occurred was due to mere oversight or neglect of the collector, and that the abatement claim had nothing to do with such delay.

## II.

**Section 611 is but a subsidiary of Section 607 of the Revenue Act of 1928, and both relate solely to administrative refunds and credits and have nothing to do with recoveries in the courts.**

Standing alone Section 611 of the Revenue Act of 1928 has no effect whatever. It merely provides that under certain exceptional conditions a payment of taxes, after the statutory limitation period for collection has expired, "Shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

It will be noted that Section 607 provides that payment made after the statutory period prescribed for collection of income taxes "shall be *considered* an overpayment" and shall be credited or refunded upon claims therefor being duly presented.

Section 607, as will hereinafter be fully shown, was enacted to authorize certain administrative refunds or credits which had previously been forbidden by Section 1106 (a) of the Revenue Act of 1926. Neither Section 607, nor its predecessor, Section 1106 (a) of the Revenue Act of 1926, had any relation to suits in courts, and, as will also be fully shown, Section 611 was not intended to have any relation thereto. They all relate only to the power of the Commissioner to make "refunds and credits" in the course of his administrative duty.

The following history of the various provisions shows (1) that when Congress legislated on the subject of "refunds and credits" it did not mean recoveries by suit, and (2) that the provisions now in question belonged in the class relating only to refunds and credits.

Section 607 provides for "credits" and "refunds." The making of credits and refunds is an administrative function of the Commissioner of Internal Revenue, and has been authorized by each succeeding revenue act since the Revenue Act of 1916 in cases of *overpayments of taxes:* Section 14 (a) Revenue Act of 1916, 39 Stat. 773. Section 252, Revenue Act of 1918, 40 Stat. 1057. Section 252, Revenue Act of 1921, 42 Stat. 227. Section 281, Revenue Act of 1924, 43 Stat. 339.

Section 284, Revenue Act of 1926, 44 Stat. 9. Section 322, Revenue Act of 1928, 45 Stat. 791.

These Sections have been held to have nothing to do with recoveries in the courts, but to relate solely to administrative credits or refunds by the Commissioner of Internal Revenue. *Fox. v. Edwards,* 287 Fed. 669. *Coffey v. Exchange Bank,* 296 Fed. 807.

Beginning with the Revenue Act of 1918 (Section 250(d), Act of February 24, 1919, c. 18, 40 Stat. 1057), Congress placed time limitations upon the assessment and collection of income taxes. Collections made after these periods were wrongful and illegal, but did not result in "overpayments" in the sense that the sums collected had never been due as taxes, and hence amounts so illegally collected were not refundable under the Sections above cited relating to overpayments. However, Section 3220 of the Revised Statutes allowed the Commissioner to make refunds of all taxes "erroneously or illegally assessed or collected * * * and all taxes * * * in any manner wrongfully collected." The Commissioner made refunds in these limitations cases pursuant to this authority.

Taxes illegally collected after the statutory period therefor, but not "overpaid" in the sense of never having been due were recoverable *in actions at law* against collectors. *Graham v. Dupont,* 262 U. S. 234.

In such cases Section 3220 of the Revised Statutes provided for *repayments* of judgments against collectors, and Section 989, Revised Statutes, provides that in cases where the courts issue certificates of probable cause, no executions shall issue against the collectors

but that such judgments shall be paid out of the Treasury of the United States. *Sage v. United States*, 250 U. S. 33. *Smietanka v. Indiana Steel Co.*, 257 U. S. 1.

*Section 607 of the Revenue Act of 1928 was enacted to clarify Section 1106(a) of the Revenue Act of 1926, a Section enacted because of the erroneous decision of the Court of Claims in the Toxaway Mills case and judicially construed as having no relation to recoveries by suits in the courts.*

In December, 1925, the United States Court of Claims decided the case of *Toxaway Mills v. United States*, 61 Ct. Cls. 363, in which the rule was laid down that a citizen *suing* to recover sums alleged to have been illegally collected after the statutory period therefor, contained in the Revenue Acts of 1918 and 1921, was required to show that he had never in fact owed the tax. It was further held that limitations contained in these revenue acts, merely operated to bar the remedy and did not extinguish the liability, so that the alleged requirement that the citizen show that he had overpaid the tax, even when collection was illegally had, was a valid requirement imposed upon citizens suing in the courts of the United States.

This decision resulted in the incorporation in the Revenue Act of 1926, 44 Stat. 9, of Section 1106, subdivision (a) of which provided:

> "SEC. 1106(a). The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such

> tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The purpose of this enactment was declared in Conference Report on the Revenue Bill of 1926 (*House Report No.* 356, *p.* 55, 69*th Congress, First Session*) as follows:

> "AMENDMENT No. 170: This amendment provides that the bar of the statute of limitations against the United States and against the taxpayer shall operate to bar the remedy and also extinguish the liability. This amendment is deemed advisable because of an opinion in a recent decision of the Court of Claims (Toxaway Mills v. U. S.), although in a case presenting the specific point this opinion very probably would not be followed by the Supreme Court. (See Taft C. J. in Graham v. DuPont, 262 U. S. 234, 256, 258.")

The taxing authorities also contended in suits for repayments of moneys illegally collected by distraint after the period prescribed for collection in the Revenue Acts of 1918 and 1921, that the limitations contained therein related only to collections had by suits against citizens and not to *distraint* collections, which, it was contended, were not "proceedings" within the meaning of the limitations provision of those Acts.

This Court in the case of *Bowers v. New York and Albany Lighterage Company,* 273 U. S. 346, decided February 21, 1927, held this construction of these statutes to be erroneous and sustained the right of citizens to *sue for* taxes illegally collected after the period prescribed therefor, without requiring proof that they had "overpaid" the tax.

The writ of certiorari had been granted in the case of the *Toxaway Mills v. United States, supra,* but in the light of the decision in the *New York & Albany Lighterage Company* case, the Solicitor General confessed error, and the decision of the Court of Claims was reversed (273 U. S. 781).

Taxpayers were much perturbed by Section 1106 (a) of the Revenue Act of 1926 which, while (1) negativing the proposition of the Court of Claims in the *Toxaway Mills* case that the running of the period of limitations on collection barred the remedy but did not extinguish the liability, at the same time (2) provided that no refund or credit should be made of sums so illegally collected unless it also appeared that the tax had been *overpaid.* In Congressional intention the first of these provisions opened the way for suit against the Government; the second denied to the Commissioner the right to make refunds on his own responsibility in such cases, and made him await the judgment of a court.

But this second provision was construed by some citizens (as has been Section 611 in the instant case by the court below) as precluding even *suit* for recovery of taxes illegally collected, after the statutory period therefor, unless the tax had been overpaid, and

suits were brought to enjoin collections of barred taxes in such cases. This was on the theory that since all adequate remedies at law had been taken away, the prohibition against the enjoining of collection of Federal taxes, contained in Section 3224, Revised Statutes, did not apply. These suits, defended by Government counsel, brought out the error of these taxpayers in assuming that Section 1106(a) related to repayments of judgments secured in the courts and it was held therein that *section 1106(a) prohibited credits and refunds by the Commissioner of Internal Revenue and had nothing to do with suits in the courts. Ellay Company v. Bowers,* 25 Fed.(2d) 637, certiorari denied 48 S. Ct. 601; *Thornhill Wagon Co. v. Noel,* 17 Fed. (2d) 407; *Gove v. Nichols,* 23 Fed. (2d) 856.

The Court of Claims, in the case of *Adelaide F. Chapman v. United States,* 63 Ct. Cls. 424, construed Section 1106(a), of the Revenue Act of 1926, as preventing recoveries of barred taxes by suit unless the tax had been in fact overpaid. However, the Solicitor General joined the taxpayer in opposing this construction of Section 1106(a), stating in his brief for the United States on application to this Court by the taxpayer for writ of certiorari in the *Chapman* case that:

> "Such a construction leads to results which Congress could never have intended. Its effect is to nullify the statute of limitations against the United States, because if the taxpayer may not enjoin the collection of a tax barred by the statute of limitations, as held in Graham v. Dupont, supra, or prevent distraint proceedings by injunction and may be compelled by the col-

> lector to pay a tax the collection of which is barred by the statute of limitations, and then may not obtain a refund of the tax as one illegally collected unless the amount paid was more than justly due before the statute of limitations ran against the claim, it is clear that the statute of limitations becomes a dead letter."

At this stage was enacted the Revenue Act of 1928 which differed from preceding revenue laws in that it merely supplemented the Revenue Act of 1926, leaving operative all provisions of the earlier law, not specifically repealed or modified. By Section 612 of the Act of 1928 it was provided that Section 1106(a) of the Act of 1926 was repealed "as of February 26, 1926," the date of its enactment, and in lieu thereof Sections 607 to 611, inclusive, were enacted. This substitution was obviously in order to clear up the confusion existing as to the meaning of Section 1106(a) of the prior Act.

Thereafter this Court, upon the motion of the Solicitor General, reversed the Court of Claims in the case of *Chapman v. United States, supra*, remanding the case with instructions to enter judgment for the taxpayer (279 U. S. 660).

It is clear from what theretofore had transpired that Section 607, in declaring that payments of taxes after the statutory period therefor "shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim" was merely authorizing what Section 1106(a) forbade, i. e., administrative

credits or refunds by the Commissioner where barred collections had been made, even though there was no true "overpayment" involved. *This was the sole purpose of Section 607, which, like the Sections which preceded it relating to credits or refunds, had nothing to do with rights of action for repayments in the courts.*

Section 611, which merely declares what "shall *not* be considered an overpayment under Section 607" was intended only to preserve (in the cases where collections had been stayed by abatement claims) the prohibition against administrative refunds, where the taxpayer had not overpaid the tax, which was formerly contained in Section 1106(a) of the 1926 Act but was removed by Section 607, and, like Section 1106(a), was not intended to have any effect upon rights of taxpayers to sue and recover in the courts.

This is emphasized by Section 619 of the Act of 1928 which amends Section 3220 of the Revised Statutes, so as to authorize the Commissioner to *refund* illegally collected taxes "except as otherwise provided by law in the case of income, war-profits, excess-profits, estate and gift taxes."

*The legislative history of Section 611 also renders necessary its construction as having nothing to do with recoveries in the courts of illegally collected taxes.*

Section 611 was enacted at the solicitation of the Treasury Department to permit of clarification by the Courts, through further decisions, of the effect of the decision of this Court in the case of *Bowers v. New York & Albany Lighterage Company, supra.*

House Bill Number One, which became the Revenue Act of 1928, as originally drawn proposed not only to prohibit refunds, but to allow further collections to be made within one year after the passage of the Act, in cases where collections had been stayed by abatement claims. The explanation of this section by the House Committee on Ways and Means (House Report No. 2, 70th Congress, First Session, page 34) appears in the appendix hereto.

The Senate opposed all change on this point, as is shown by Senate Report to the Finance Committee (Senate Report No. 960, page 42, 70th Congress, First Session).

In conference a compromise was reached in which the portion of Section 611 relating to *refunds* was allowed to stand and the portion of Section 611 authorizing further collections was stricken out of the bill as finally enacted.

The Managers for the House in this connection stated:

> "The House Bill (Sec. 611) provided that in cases in which a tax was assessed within the period of limitation upon assessments and thereafter (whether before or after the expiration of such period) a claim in abatement was filed with or without bond and if proceedings for the collection of the tax were not promptly instituted (as would have been the case had the claim in abatement not been filed), then (1) if any part of the amount covered by the claim in abatement was thereafter paid, such amount should not be refunded solely because of the fact that it was paid after the running of the statute

and (2) in cases where the amount was not paid, it could be collected by distraint or proceedings in Court begun within one year after the enactment of the new law. *The Senate amendment struck out this section and the House recedes with an amendment retaining the prohibition on refunds, as above described, and eliminating the authority for collection.*" (Statement of Managers for the House, page 22.)

By eliminating the *authority for collection* Congress refused to "withdraw" from the taxpayer "the defense of the Statute of Limitations" which the Committee on Ways and Means (see Appendix) originally planned to do. The House *receded* on this point but insisted on the prohibition of *refunds.*

The reports of these Committees say nothing about suits in the Courts, but do refer to *refunds,* which, it must be presumed, were known to the Committees to be administrative acts of the Commissioner, and something different from repayments of judgments duly secured in the Courts. Had it been intended to affect recoveries in the Courts, language appropriate to express that intent unquestionably would have been employed and appropriate modifications would have been made of Sections 989 and 3220 of the Revised Statutes, which regulate suits and recoveries in the Courts. *Sage v. United States, supra. Smietanka v. Indiana Steel Company, supra.*

Everything that was provided in Section 611 as originally drawn, and as finally enacted, and everything that was said by the House and Senate Committees was entirely consistent with a purpose merely

to prohibit administrative refunds in the situations described.

Section 611 is a mere limitation upon Section 607, and no one will seriously contend that Section 607 purported to establish any rule as to suits in the courts, in cases of payments or collections of taxes after the statutory period for collection had expired. In making Section 611 a mere limitation upon or exception to Section 607, Congress was going fully as far as it intended to go, and, indeed, as far as the administrative officers had asked it to go in providing relief against the effect of the decision of this Court in the *New York & Albany Lighterage Company* case.

Congress showed no purpose to prescribe what the courts should decide was the effect upon taxpayers' rights to recover illegally collected taxes in cases where collections were stayed by abatement claims filed by the taxpayers. That issue was left to be raised by way of defense by the United States, or by collectors, in suits brought by taxpayers to recover sums claimed to have been illegally collected after the statutory period therefor. It is usual for Congress to direct what administrative officers may do, but unusual for Congress to prescribe what *facts* shall be held by the courts to constitute an estoppel, and an intent so to do is nowhere expressed in Section 611, which by its terms and relation to other sections of the law relates only to administrative credits and refunds.

All the decisions, so far rendered, which have held that Section 611 was a bar to recoveries in the courts appear to have done so because it was not realized that the Congress, in the revenue laws, has consistently

maintained distinctions between credits and refunds of *overpayments* made in the exercise of administrative discretion, and recoveries in the courts of taxes *illegally collected*, and has, as in Section 1106(a) of the Act of 1926, forbidden such credits and refunds even though, when suits were prosecuted, recoveries might be had. Illustrative of this fallacy are decisions in the cases of *Wright & Taylor* v. *Lucas*, 34 Fed.(2d) 328, and *Regla Coal Co.* v. *Bowers* 37 Fed.(2d) 373.

In *Reeves v. Anderson*, decided July 21, 1930, (opinion reprinted in Prentice Hall Federal Tax Service, 1930, at page 1705), the Circuit Court of Appeals for the Second Circuit concluded that Section 607 was inserted for the purpose of giving a definition of overpayment, in addition to the purpose of allowing administrative credits and refunds which had been forbidden by Section 1106(a) of the Revenue Act of 1926. The court then considered Section 611 as limiting that definition, and as only incidentally forbidding credits and refunds under that section. This construction, as the legislative history of Section 607 shows, forces that section to serve a broader purpose than was intended—a purpose, as the court concedes, which was unnecessary because of other provisions which were already in the law. Also, Section 607 is plainly an enactment in favor of taxpayers, and the terms employed ("shall be *considered* an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period for filing such claim") seem to show a purpose merely to define the exact extent to which

payments, made under the circumstances described in that section, shall be treated administratively as are true overpayments of taxes. These terms show no purpose to limit in any way the rights of taxpayers to recover such payments under other provisions of the law as taxes illegally collected.

In that case the Commissioner made collection about six weeks after he had rejected the claim in abatement; in the present case, the record shows that he waited approximately one year, ten and a half months. Apparently the Second Circuit might have taken a different view of the present case, where the delay in collection was obviously not due to the pendency of the claim in abatement, since Judge Hand's opinion says:

> "Only in case the taxpayer had positively caused the Treasury's inaction by demanding a hearing, was his advantage taken from him."

In the present case, the taxpayer is not responsible for the delay of one year, ten and a half months after the taxpayer's claim had been disposed of.

## III.

**Sections 607 and 611 do not purport to apply to cases arising prior to the enactment of the Revenue Act of 1928, and may not be given retroactive effect.**

The provisions of Section 607 are, by its terms, entirely prospective. Said Section provides that taxes which have been illegally collected after the period of limitations:

> "*Shall* be considered an overpayment and *shall* be credited or refunded to the taxpayer, if claim therefor *is* filed within the period of limitations for filing such claim."

The terms employed are in the present and future tenses. How, therefore, can they be said to permit application of that Section to cases, such as the present, where taxes have been illegally collected and a claim for refund *was* filed and *was* denied long before the Revenue Act of 1928 was enacted, and especially where the sole issue is whether the Collector of Internal Revenue—who has never had the authority to make refunds—illegally collected the tax? Moreover, said section does not bear after its heading the word "Retroactive"—a practice followed in the statute where retroactive effect was intended. Compare Sections 702 to 706 of said Act.

If the statute be given effect as to all claims for refund or credit presented after the passage of the Revenue Act of 1928, it will have effect and meaning. To give the section a broader scope is to alter and extend the plain and ordinary meaning of the terms employed where a reasonable result is produced by giving them their plain and ordinary meaning. In addition, such construction will operate retroactively without any basis therefor appearing in the statute. Such construction is to be avoided. In *United States v. Magnolia Petroleum Co.*, 276 U. S. 160, 162, the rule is thus stated:

> "Statutes are not to be given retroactive effect or construed to change the status of claims

fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears."

*If retroactive, Section* 611 *was intended, at most, to apply to cases of voluntary payments and not to collections exacted by duress.*

In these cases of voluntary payment a taxpayer and a collector are mutually mistaken as to the effect of the limitations upon collection of taxes. To let the loss lie where it fell in such a case is not inequitable. *Joy Floral Company v. Commissioner of Internal Revenue,* 29 Fed.(2d) 865. To penalize those who were not in error and who resisted collection, insisting upon a proper interpretation of the law, is an inequitable construction.

The Commissioner has recognized that only such payments as are *voluntarily* made after the effective date of the Revenue Act of 1928, in cases where collections were stayed by abatement claims, come within the provisions of Section 611. See Instructions to Collectors, Mim. 3460, Cumulative Bulletin VII-2, p. 82 (Prentice-Hall (1930), page 19,344), where it is directed:

"Collection Not To Be Enforced.

"(1) Sections 607 and 611 do not authorize the Bureau to enforce collection of a tax in any case after the expiration of the period of limitations but merely prescribe the effect of the period of limitations against the United States upon any assessment or payment made after the expiration of the period of limitations applicable

thereto. Therefore, no attempt will be made to enforce collection of any outstanding assessment if the period of limitation within which collection can be made has expired, or to make any assessment of any tax if the period of limitation within which the assessment can be made has expired, or to enforce collection of any tax if the assessment was not made within the period of limitation prescribed for the making of the assessment and if no suit for collection without assessment was begun prior to the expiration of such period."

* * * * * * *

"Administrative Procedure.

"(a) The taxpayer will be advised by the Income Tax Unit of its rights under Section 611 of the Revenue Act of 1928, and unless it is disposed to make voluntary payment, within one year after the enactment of the said Act, after a full understanding of the meaning of such section an appropriate certificate of overassessment will be issued. * * *"

Thus, after the 1928 Act, the Commissioner refrained from compelling the payment of barred taxes, and yet, under that law, was unable to make administrative refunds of such taxes after a taxpayer had paid without compulsion. If this distinction between voluntary and involuntary payments is reasonable for the period after the enactment of the 1928 Act, it seems a reasonable distinction before, if that Act is to be given retroactive effect.

## IV.

**If Section 611 was intended to bar actions in the courts it is void as an attempt to take property without due process of law.**

(a) *The protection afforded citizens by the Fifth Amendment to the Constitution, against Federal statutes which have the effect of taking property without due process of law, includes protection against statutes which recreate, or revive liabilities which have become extinguished through lapse of time. Danzer and Co. v. Gulf and Ship Island R. R. Co.*, 268 U. S. 633, 636. *Davis v. Mills*, 194 U. S. 451. *The Harrisburg*, 119 U. S. 199.

In these cases this Court distinguished the earlier case of *Campbell v. Holt*, 115 U. S. 620 (to the effect that limitations of the time for asserting common law liabilities might legally be changed or taken away altogether), saying that in *Campbell v. Holt* (involving a breach of common law liability on a contract) the limitation provisions applied "to the remedy only", but pointed out that other types of limitation "operate as a limitation upon *liability.*" The Court cited many cases in which liabilities were created by statute and limitations contained in the same or later statutes were held to bar not only the remedy but the liability itself. In the latter type of limitation, it is held that Congress lacks the power to revive the limitation, and thus revive the liability.

So, here, income taxes are statutory liabilities, and the limitations upon the collection thereof, contained

in the same or later Revenue Acts, are clearly limitations which not only bar the Government's remedy (i. e., the right to enforce collection) but extinguish the taxpayer's liability for the tax.

Legislative history fortifies the conclusion that these tax limitations are designed to protect the taxpayer from *claims* asserted by the Government, not merely to afford him a defense.

The purpose of the statutes of limitations upon the assessment or collection of taxes which have been placed in all Revenue Acts since the Revenue Act of 1917, has plainly been to provide a time when the sovereign and the citizen can close accounts on tax matters. This was well expressed by Mr. Hawley of Oregon, a member of the House Committee on Ways and Means, which drafted the Revenue Act of 1921. In speaking for the proponents of the measure, on the floor of the House, Mr. Hawley said (Congressional Record, Volume 61, page 5201) in reference to Section 250 (d) of the Revenue Act of 1921 that it was—"for the purpose of compelling the Government to close out its accounts with every taxpayer."

Continuing his address, Mr. Hawley stated:

> "A great many business transactions are suspended and are not consummated for the reason that the person intending to buy says: 'What liabilities are there on this property?' And, among others, there is stated to be a certain amount of tax in dispute. Men do not like to buy property, especially when the amount of tax in dispute is large. Many very important

transactions have been lost, and this will open up the way to their settlement."

That the purpose was simply this and not, as supposed by some courts which have construed Section 611 (see opinion in *Regla Coal Company v. Bowers, supra*) to force action before evidence became stale, is conclusively demonstrated by the successive reductions of the periods of limitation upon assessments and collections contained in the previous revenue acts. Compare Sections 250 (d) Revenue Act of 1918 (40 Stat. 1057, 1083) and 1921 (42 Stat. 227, 265), Sections 277 and 278, Revenue Act of 1924 (43 Stat. 253, 299) and 1926 (44 Stat. 9, 58, 59) and Section 275 of the Revenue Act of 1928, (45 Stat. 791, 856), under which the periods of limitation on assessment have been reduced from five to two years from the date the return was filed, and with a fixed limitation in recent years of six years from the date of assessment within which collection may be had. It is to insure that taxpayers may have order in their affairs, and to enforce expedition from the taxing authorities, that limitations upon collections of taxes are imposed, and when these periods have expired it has been the will of Congress that all further tax liability shall cease.

The foregoing seems to have been recognized recently by this Court in its decision in the case of *United States v. Updike*, U. S. Supreme Court Advance Opinions 1929-1930 (74 L. ed. —), page 536. This Court there said in reference to limitations on collection after valid assessment contained in Section 278 of the Revenue Act of 1926 (p. 539):

> "An actual assessment having been made, it must be assumed that the Government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow an indefinite time for proceeding to collect the tax would be out of harmony with the obvious policy of the act to promote repose by fixing a definite period after assessment within which suits and proceedings for the collection of taxes must be brought."

The limitations under consideration in the *Updike* case are founded in exactly the same policy as that which has existed since the first limitations upon collection were prescribed in 1918.

(b) *The proposition that the running of the statute extinguished the liability for the tax has formed a necessary basis for all decisions sustaining the right of citizens to sue collectors of internal revenue, and recover sums illegally exacted as taxes, after the statutory periods for collection had run.*

There are no statutes which specifically authorize suits against collectors in cases of this kind. Such actions are brought as common law actions in assumpsit, for moneys had and received, and are personal to the collector, and not against his office. *Smietanka v. Indiana Steel Company*, 257 U. S. 1; *Levy v. Wardell*, 258 U. S. 542.

Such actions retain their common law basis, notwithstanding the statutory provisions for proceedings before the Commissioner of Internal Revenue required as conditions precedent to suit (Sections 3226 and 3228, Revised Statutes) and those statutes which provide

for the conversion of a judgment against a collector to one against the United States, and its repayment. Sections 989 and 3220, Revised Statutes; *Patton v. Brady*, 184 U. S. 608; *Sage* v. *United States*, 250 U. S. 33.

Actions in assumpsit for money had and received depend upon the fact that the person taking the same had no right thereto. The only basis upon which recoveries could have been recognized in *Graham v. Dupont, supra*, and allowed in *Bowers v. New York & Albany Lighterage Company, supra*, was that the citizen did not owe the sum exacted as a tax, at the time collection was forced.

Limitations which bar the remedy only are matters of *defense*, and do not form a basis for affirmative actions such as are here involved. This precise question was raised in *Bashara v. Hopkins*, 290 Fed. 592, 595, where the taxpayer sued to enjoin a forcible collection by distraint after the statutory period for collection had run, on the ground that while this fact was open to him as a defense in a *suit* to enforce collection it was not available as a basis for recovery after collection by distraint. The district court held, as did this Court in *Graham v. Dupont*, that injunction would not lie since the citizen had a right to sue the collector and recover after collection by duress was had, distinguishing this type of case from *Campbell v. Holt, supra*, by the fact that the running of the statute extinguished the liability.

Compare, also, *Citizens Bank v. Miller-Link Lumber Company*, 16 Fed.(2d) 163, holding that a claim for

taxes against an insolvent taxpayer could not be presented by way of intervention in receivership proceedings after the expiration of the period of limitations upon collection; the case of *United States v. John Barth Company*, 27 Fed.(2d) 782, holding liability under a bond given to stay collection of a tax, extinguished by the running of the statutory time for collection (reversed by this Court on another ground, 279 U. S. 370); and *Joy Floral Company v. Commissioner*, 29 Fed.(2d) 865, holding that a waiver given after the period of limitation on collection was of no effect. The decision of the Court of Claims in the case of *Stange v. United States*, — Ct. Cls. —, Prentice-Hall 1929 Federal Tax Service, Par. 1715, which is contrary to the foregoing, is now before this Court on certiorari (No. 23, October Term, 1930).

Congress has recognized this to be the effect of limitations on tax collections, for Section 1106(a) of the Revenue Act of 1926 expressly provided that:

> "The bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability * * * ."

As has been shown elsewhere in this brief (pp. 12-13), this provision was intended merely to be declaratory of the law, as it had always been, and was enacted to offset a contrary holding by the Court of Claims in the case of the *Toxaway Mills v. United States*, 61 Ct. Cls. 363, as was recognized by the Solicitor General in the case of *Chapman v. United States, supra.*

In this connection the recent decision of the Supreme Court of the State of Pennsylvania in the case of *Wettengel v. Robinson et al.*, C. C. H. 1930 Standard Fed. Tax Service Par. 9360, decided May 12, 1930, is of interest as that Court plainly recognized the distinction between ordinary statutes of limitation and provisions limiting collections of taxes contained in the Federal revenue laws, and held that the attempted retroactive repeal of Section 1106 of the Revenue Act of 1926 by Section 612 of the Revenue Act of 1928 was inoperative as to any taxes which had become barred prior to the passage of the Revenue Act of 1928. The reasoning of this case is sound, and, since the tax in the instant case became barred prior to the Revenue Act of 1928, it would seem that Section 1106 in and of itself operated to destroy whatever liability might have existed without taking into consideration the provisions of said section.

This court has held that limitations upon the time within which suits may be brought to recover taxes erroneously or illegally collected, are substantive, and not mere matters of limitations to be raised as a defense. (*Cheatham v. United States*, 92 U. S. 85; *Arnson v. Murphy*, 115 U. S. 579, 586.) If limitations against the taxpayer are more than mere procedural limitations, then limitations against the taxing agencies of the Government ought to be similarly construed.

The Courts which have construed Section 611 as operating merely to withdraw the *defense* of the statute of limitations, upon authority of the decision in *Camp-*

*bell v. Holt, supra,* have wholly failed to show how a mere matter of defense can form the basis for an affirmative action in assumpsit. It seems to have been assumed in those cases (*Wright & Taylor v. Lucas, supra; Regla Coal Company v. Bowers, supra;* and *Oak Worsted Mills v. United States,* 68 Ct. Cls. 359), that actions against collectors in such cases are in themselves founded upon the limitations provisions of the revenue laws. Such is not the case, as these limitations refer solely to the administrative matter of collecting taxes and make no provisions for suits for recoveries of sums collected in violation of such provisions.

(c) *Section 611 was not intended as a ratification of illegal collections of taxes made after the statutory period therefor.*

This Court has sustained the power of Congress to ratify illegal acts of collectors of public revenues, and to do so even though suits for the recoveries of moneys so illegally collected were pending at the time the ratifying statutes were passed. *United States* v. *Heinszen,* 206 U. S. 370. *Rafferty* v. *Smith, Bell and Company,* 257 U. S. 226.

In these cases, however, there were involved statutes which *expressly* ratified the illegal collections and were susceptible of no other meaning. In the *Heinszen* case this Court pointed out that, while Congress could ratify illegal collections, "it is not to be presumed to do so on language which, literally taken, has a narrower sense" citing its decisions against implied ratifications in *Lincoln* v. *United States,* 197 U. S. 419 and *De Lima* v. *Bidwell,* 182 U. S. 1.

The language employed in Section 611, literally taken, has a much narrower sense than ratification, and when given effect in the narrower sense is productive of every result which the legislative history of the Section shows was intended to be achieved by the Congress, through said Section, to-wit, the making of credits or refunds by the Commissioner of Internal Revenue, leaving to the courts the question of the effect of "collections stayed by claims in abatement" upon rights of taxpayers to recover sums alleged to have been illegally collected.

Under such circumstances ratification is not to be presumed to have been intended.

Congress lacked the power to ratify illegal collections at the time Section 611 was enacted.

The situation existing when Section 611 of the Revenue Act of 1928 was enacted, and that involved in *United States* v. *Heinszen, supra,* and *Rafferty* v. *Smith, Bell and Company, supra,* were very different.

In the latter cases certain tariff duties had been exacted upon imports to and from the Phillipine Islands at times when Congress had passed no laws laying such taxes. Later Congress, by special enactment, expressly "legalized and ratified" the duties collected, and the collection thereof. In the cases cited this Court sustained the ratifications upon the ground that Congress had at all times the power to lay the taxes and to provide for the collection actually had. That this was the basis for these decisions was stated in the opinion of this Court in *Forbes Pioneer Boat Line* v. *Everglades Drainage District,* 258 U. S. 338, 339, where the rule was stated to be that:

"* * * A tax may be imposed in respect of past benefits, so that if, instead of calling it a ratification, Congress had purported to impose the tax for the first time, the enactment would have been within its power."

Section 611 of the Revenue Act of 1928, does not purport to lay a tax for the first time. It presupposes that a tax has been laid by appropriate enactment, and has been ascertained and lawfully assessed against the individual taxpayers. If it has any effect as a ratification it is a ratification of collection only.

But the tax laid had been *extinguished* by the expiration of time limitations made part of the tax, by the same agency which laid the tax, and before the collection may be ratified the tax itself must be revived. The Circuit Court of Appeals for the Third Circuit in its recent opinion (July 9, 1930) in the case of *Heiner v. Erie Coal and Coke Company*, (C. C. H. Standard Federal Tax Service, 1930, page 8889) was unable to find anything in Section 611 which operated to revive a barred liability for a tax.

The power to revive a tax, like the power to ratify, may be exercised only if the rights of private parties have not intervened. *Stockdale* v. *Life Insurance Company*, 87 U. S. (20 Wall.) 323. But, as has been recognized by this Court, citizens who have suffered wrongful exactions of money by collectors of internal revenue, acting without the scope of their office, do have rights enforcible against said collectors, as individuals. This bars a revival of the tax since such rights of action are property within the meaning of the Fourteenth and Fifth Amendments to the Constitution.

In *Gilbert* v. *Ackerman*, 159 N. Y. 118, the Court of Appeals of the State of New York aptly stated the rule as follows:

> "The right possessed by a person of enforcing his claim against another is property and if a statute of limitations, acting upon that right, deprives the claimant of a reasonable time within which suit may be brought, it violates the constitutional provision that no person shall be deprived of property without due process of law."

In the case of *Angle* v. *Chicago etc. Railway Company*, 151 U. S. 1, 19, Mr. Justice Brewer, speaking for this Court, said as follows:

> "A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."

The case of *Forbes Pioneer Boat Line* v. *Commissioner, supra,* is in point. There the plaintiff was the owner of a boat. He made use of a canal in the State of Florida to secure passage for his boat. The Commissioners of the Drainage District, through which the canal ran, exacted a toll for this service. The plaintiff paid the toll under duress and then sued for its recovery. The collections of toll were illegal when made but the Legislature of the State of Florida, while plaintiff's action was pending, attempted to correct the

situation by passing an Act imposing the toll as of the date when the plaintiff had used the canal, and the defendants set up this new Act of the Legislature as a defense. This Court held that the Legislature could not validate the illegal acts of the Commissioners in this manner, holding that the plaintiff's right of action to recover the illegally collected toll could not be taken from him by subsequent legislation in view of the provisions of the Fourteenth Amendment prohibiting the taking of property without due process of law.

(d) *If intended as a ratification of illegal collections in cases where collection was stayed by claims in abatement, Section 611 operates in such an arbitrary and discriminatory manner as to constitute confiscation of private property.*

If Section 611 be a ratification or revival of barred taxes it is valid or invalid by the same tests which are applied to taxes when laid in the first instance. It is well settled that Congress for all its broad powers to lay taxes must act in that respect so as to produce results conformable to the purposes of taxation, and its enactments which go beyond this and are so arbitrary and discriminatory as to amount to confiscation will not be sustained. *Brushaber v. Union Pacific Railroad Company*, 240 U. S. 1; *Nichols v. Coolidge*, 274 U. S. 531; *Blodgett v. Holden*, 275 U. S. 142.

This is especially true as to the classification of the persons subject to the tax as decided by this court in the case of *Schlesinger v. Wisconsin*, 270 U. S. 230, where it was said:

A classification for the purposes of taxation must rest upon some reasonable distinction.

It seems probable that Congress, if it possessed the power to revive an extinguished tax, might do so as to *all* taxes laid and assessed, but not theretofore collected. In such cases it would be reasonable to retain all moneys illegally collected after the statutory period therefor and to require collection of all unpaid assessments. That is not the situation created under Section 611, as construed by the court below, or under any possible view of said section, as a ratifying statute. Nor does Section 611 even operate to remove the benefit of the statute of limitations from all who had by their own acts "stayed" collections of the tax. Instead, only one out of five types of cases where collections have been "stayed" is reached by the section.

(1) Section 611 does not authorize the retention of moneys illegally collected where collection was stayed by claims for credit (G. C. M. 6296—Cumulative Bulletin VIII-35-4326).

(2) Section 611 does not authorize collections from those who stayed collections by abatement claims, but who had not been forced to pay prior to the enactment of the Revenue Act of 1928. (I. T. 3660—Cumulative Bulletin VII-2, p. 82).

(3) Section 611 does not authorize collection or the retention of sums voluntarily paid after the statutory period for collection and more than one year after the Revenue Act of 1928 was passed, even though the collection was stayed by an abatement claim.

(4) Section 611 does not authorize collection to be made from those who stayed collection by claims in

abatement, but who, prior to the Revenue Act of 1928, had recovered by administrative refunds, or suits in the courts, taxes illegally collected after the statutory period therefor.

Section 611 applies only to moneys wrongfully gotten and in the possession of collectors or the Treasury, when the Revenue Act of 1928 was passed, or sums voluntarily paid within one year thereafter, thereby disclosing the true purpose of the Section (as construed by the court below) to be to *confiscate* that which is at hand, not to acquire by taxation that which was formerly due, but which, due to the Government's own mistake of law (*Bowers v. New York & Albany Lighterage Company, supra*) was not collected in time.

Section 611, as construed by the court below, goes beyond the ordinary meaning of the terms employed therein, produces harsh and inequitable results, and is unconstitutional. If construed as relating only to administrative refunds and credits and not to actions in the courts, effect is given to the terms employed in their ordinary sense and meaning, and a result within the power of Congress to provide is reached. The latter construction should be adopted by this Honorable Court.

On June 2, 1930, the United States Court of Claims decided the case of *Wyman, Partridge Company v. The United States,* (No. J-352), reported in Prentice-Hall (1930) Federal Tax Service, par. 1209, and C. C. H. (1930) Standard Federal Tax Service, page 8765, and distinguished that case from its decisions in the cases previously decided by it on this point (*Oak*

*Worsted Mills v. The United States,* 68 Ct. Cls. 359, and *Gotham Can Company v. The United States,* 68 Ct. Cls. 749), in that the illegal collection in the *Wyman, Partridge Company* case occurred after the enactment of the 1926 Act, whereas, in the two other mentioned cases, as well as in the case herein, collection occurred prior to that Act, which contained a provision in Section 1106(a) thereof that the running of the statute of limitations extinguished the liability as well as the remedy.

We believe the holding should have been for the taxpayer in both classes (collection before the 1926 Act became effective, and collection after it became effective), and that the court's failure so to hold was due to its misunderstanding of this Court's opinions as to whether an ordinary statute of limitation in the taxing act destroys the liability, the remedy, or both.

The Court, in the *Wyman, Partridge case,* was of the opinion that Section 1106(a) was not retroactive, but did not give any consideration to the claim that Section 611 was not intended to be retroactive.

Respectively submitted,

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## APPENDIX.

The House Committee on Ways and Means, in House Report No. 2, 70th Congress, 1st Session, p. 34, referred to Section 611 of the Revenue Bill of 1928 as follows:

> "Prior to the enactment of the Revenue Act of 1924, it was the administrative practice to assess immediately additional taxes determined to be due. Upon the assessment, taxpayers were frequently permitted to file claims in abatement with the Collector and thus delay the collection until the claim in abatement could be acted upon. If this practice had not been followed, undue hardship undoubtedly would have been imposed upon the taxpayer. It was supposed that there was no limitation upon the collection by distraint of the amount ultimately determined to be due. However, the Supreme Court has recently held in a case in which the period for assessment expired prior to the enactment of the 1924 Act, that the period for collection was limited to five years from the date on which the return was filed. Decisions upon claims in abatement are being made every day. Amounts have been paid, are being paid, by the taxpayer even though the statute of limitations may have run. Exceptionally large amounts are involved. Accordingly, it is of utmost importance to provide that the payments already made should not be refunded. In order to prevent inequality it is also provided that the amounts not yet paid may be collected within a year after the enactment of the new Act.

Your Committee appreciates the fact that this provision will probably be subjected to severe criticism by some of the taxpayers affected. However, it must be borne in mind that the provision authorizes the retention and collection only of amounts properly due, and merely withdraws the defence of the statute of limitations. If it is determined that the amount paid is in excess of the proper tax liability, computed without regard to the statute of limitations, such excess will constitute an overpayment which may be refunded or credited as in the case of any other over-payment."

(5002)